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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 481 F. 2d 307.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1973. On August 23, 1973 a petition for rehearing was denied (Pet. App. C). The petition for a writ of certiorari was filed on September 18, 1973, and was granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the light of *Miller* v. *California*, 413 U.S. 15, and companion cases, 18 U.S.C. 1461, which makes criminal the mailing of obscene matter, is unconstitutionally vague on its face or as applied to petitioners' pre-*Miller* conduct.

2. Whether, in light of *Miller*, the indictment framed in the terms of the statute was sufficiently definite to advise petitioners of the offenses charged against them.

3. Whether the trial court properly instructed the jury with regard to the material's prurient appeal to sexually deviant groups, with regard to pandering, and with regard to the mental elements required to prove a violation of 18 U.S.C. 1461 and 371.

4. Whether the jury and the court of appeals properly found that the advertisement was obscene.

5. Whether the trial court properly excluded alleged comparable materials from evidence.

6. Whether the evidence was sufficient to support the convictions.

7. Whether the court below correctly held that petitioners were not prejudiced when the trial court heard their objections to the jury instructions at bar, but did not dismiss the jury in strict accordance with Rule 30, Fed. R. Crim. P.

8. Whether the petit jury panel was selected from a fair cross-section of the community, and whether the court's *voir dire* was adequate.

9. Whether the grand jury was prejudiced against petitioners.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation of disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

1. This case involves a scheme to distribute a book entitled, *The Illustrated Presidential Report of The Commission on Obscenity and Pornography.*[1] The book contained the text of the official *Report of the Commission on Obscenity and Pornography* and numerous photographs asserted to be "examples of the type of subject matter" discussed and used by the Commission. The *Illustrated Report* was widely advertised by a mailed brochure whose inside page, containing a collage of photographs from the *Illustrated Report*, is described by the court of appeals, as follows (the brochure is reproduced at J.A. 92A)[2] (481 F. 2d at 316–317):

> The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a

[1] Hereafter referred to as the "*Illustrated Report*" or the "*Report.*"

[2] J.A. refers to the appendix in this Court.

male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina.

2. On March 5, 1971, a Grand Jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on twenty-one counts of an indictment charging use of the mails to carry an obscene book (*the Illustrated Report*), an obscene advertisement, and advertisements giving information as to where, how, and from whom and by what means the *Report* might be obtained, and of conspiracy to commit the above three offenses, in violation of 18 U.S.C. 2, 1461 and 371.[3] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient

[3] Greenleaf Classics, Inc., the publisher of the *Illustrated Report*, was also indicted, but was acquitted on the counts involving the advertisements, including conspiracy, and the jury was unable to reach a decision on the counts involving the *Illustrated Report*.

evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on the ground that the plan for selection of grand and petit jurors in the Southern District of California systematically excluded all persons under 25 years of age. The district court denied all of these motions.

Following a jury trial, petitioners were convicted on twelve counts of mailing and conspiring to mail the obscene advertisement.[4] Petitioner Hamling was sentenced to imprisonment for one year on the conspiracy count, and consecutive to that, concurrent terms of 3 years each on the eleven substantive counts, and he was fined $32,000; petitioner Kemp was sentenced to imprisonment for one year and a day on the conspiracy count, and consecutive to that, concurrent terms of two years each on the eleven substantive counts; petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years; petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000, respectively.

The court of appeals affirmed in a lengthy opinion. After reconsidering a petition for rehearing in light *of Miller* v. *California,* 413 U.S. 15, and companion

[4] The court dismissed four of the substantive counts for lack of proof, because the persons to whom the *Report* or the advertisement were mailed were not available to testify at trial. The jury was unable to reach a decision on five of the counts dealing with mailing the *Illustrated Report* and advertising how and where to get it.

cases[5] (Pet. App. B), the court denied rehearing (Pet. App. C). The court said (Pet. App. 39–40):

> We heretofore determined that the evidence was abundantly sufficient to meet, and the District Court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs* test. *United States* v. *One Reel of Film, et al.*, — F.2d — (1st Cir., July 16, 1973, No. 73–1181) at pages 5 and 7 of the slip opinion, in considering the same problem, succinctly states:
>
> "*A fortiori* the more relaxed standards announced by the Supreme Court were met.
>
> "[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States* v. *12 200-Ft. Reels of Super 8mm. Film, supra,* 41 U.S.L.W. at 4963, n. 7."

3. The facts adduced at trial showed that postal patrons in various parts of the country received the brochure advertising the *Illustrated Report* (J.A. 101–122). The mailings these persons received consisted of an outer envelope, an inner return envelope addressed to Library Service, Inc., P.O. Box 20308, San Diego, California 92120, and the brochure itself (which also identified Library Service, Inc., at the same address, as the party responsible for the mailing). The outer envelopes bore a postmark that indicated they were mailed from North Hollywood, California, on or about

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[5] *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *United States* v. *Orito*, 413 U.S. 139; *United States* v. *12 200 Ft. Reels of Super 8mm. Films*, 413 U.S. 123; *Kaplan* v. *California*, 413 U.S. 115.

January 12, 1971, and that the postage was affixed to the envelopes by Pitney-Bowes Meter No. 137583 (Gov. Exhs. 2–5, 7–13).*

The mailing of these brochures was accomplished by petitioners through the use of other businesses. Approximately 55,000–58,000 of these brochures were placed in envelopes and postage was affixed to them by Richard and Venita Harte, who operate the Academy Addressing and Mailing Service (J.A. 123–126). The brochures and the Pitney-Bowes Meter No. 137583, with which they affixed the postage, were supplied to them by Bernard Lieberman of Regent House, Inc. of North Hollywood, California (J.A. 123–126) who, on January 11, 1971, had paid the United States Postal Service to set $3,300 worth of postage on Meter No. 137583 (Gov. Exhs. 26–29). Regent House was billed $541.15 by the Harte's for their services (J.A. 129–130). Regent House in turn charged its services and costs for the postage and the Harte's mailing service to Reed Enterprises, Inc., which paid the bill on January 19, 1971 with a check signed by petitioner Hamling (Gov. Exhs. 47, 48).

Those individuals responding to the brochure would be sent copies of the *Illustrated Report,* which would be mailed with postage affixed by Pitney-Bowes Meter No. 901613 which was installed at Library Service, Inc., at the direction of Mr. James Fernandez, an employee of Pitney-Bowes (R.T. 504–506). The rental agreement for this meter was signed for Library Service by petitioner David Thomas, whom Fernandez

* "Gov. Exh." refers to the government's exhibits at trial; "R.T." refers to the transcript of the trial proceedings.

identified as the person with whom he had dealt on this matter (J.A. 132–134; Gov. Exhs. 40a, b, and c).

The individual petitioners were all shown to be officers in the corporate petitioners, and they were shown to be intimately involved with selling the *Illustrated Report,* which entailed mailing out the advertisement brochure. Petitioner Hamling, as president of Reed Enterprises (Gov. Exhs. 30–31), signed the check on the corporation's behalf in payment to Regent House for the mailing of the advertisement (Gov. Exhs. 47, 48). Petitioner Kemp was vice president of Greenleaf Classics, Inc. and Library Service, Inc. J.A. 145–146), as well as editor of the *Illustrated Report.* He signed the application on behalf of Library Service, Inc. for post office box 20308, which was the same post office box on the return envelope sent with the advertisement and on the advertisement itself (J.A. 140–146; Gov. Exhs. 38c, 39a and c). Petitioner Thomas signed the rental agreement for postage meter No. 901613 which was used in affixing postage for sending copies of the *Illustrated Report,* and which Thomas directed to be installed at Library Service (J.A. 132–134; Gov. Exhs. 40a, b, and c).

Petitioner Wright was the secretary of Reed Enterprises and Greenleaf Classics, Inc. (J.A. 145; Gov. Exhs. 30–36). Wright assisted the postal superintendent in getting Kemp's signature on the application for post office box 20308 (J.A. 141–143). Wright also received a memorandum from London Press, Inc., the printer of the *Illustrated Report,* addressed to her as representative of Reed Enterprises, Inc., confirming the shipment of 28,537 copies of the *Illustrated*

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Report (Gov. Exh. 51). Numerous other corporate documents evidenced the individual petitioners' intimate involvement with the corporate petitioners (Gov. Exhs. 30–37a, 84–90).

Three expert witnesses testified for the government on the obscenity of the materials involved. Dr. Roy Madsen, an expert in the field of communications, testified primarily about the *Illustrated Report*. Dr. Melvin Anchell, a psychiatrist from Los Angeles, testified that the dominant theme of the brochure was "pruriency" (J.A. 147). Frank Getlein of Washington, D.C., a syndicated journalist with the Washington Evening Star, was qualified as an expert on both national contemporary community standards regarding the depiction of sexual matters and redeeming social value. He testified that the brochure was patently offensive by contemporary community standards and was utterly without redeeming social value (J.A. 149–151).

Petitioners' experts, Dr. W. Cody Wilson and Dr. Otto N. Larsen, testified that the brochure did not appeal to prurient interest and that it did not go beyond customary limits of candor in sexual matters and was not patently offensive (J.A. 166–169, 190–194). In addition, Professor Dwight V. Swain, a professor of Journalism and Literature, testified that the brochure had redeeming social importance (J.A. 185).[7]

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[7] Contrary to petitioners' statement (Pet. Br. 11–12, 60), the government never stipulated that every picture in the *Illustrated Report* was related to the text of the official Commission Report. The only stipulation in that regard was that every picture in the *Illustrated Report* was "similar to at least some of the material that was used by some of the researchers in some of

SUMMARY OF ARGUMENT

1. The decisions of this Court last Term in *Miller* v. *California*, 413 U.S. 15, and companion cases, establishing standards of obscenity, do not make 18 U.S.C. 1461 unconstitutionally vague on its face or as applied to petitioners' pre-*Miller* conduct. Petitioners were tried and convicted under the *Roth-Memoirs* definition of obscenity. For the most part that definition imposed more stringent burdens of proof on the government than is required under *Miller*, and to that extent petitioners were not prejudiced by a trial under *Roth-Memoirs*. The only aspect of *Miller* which could conceivably create First Amendment protections not available before that decision is the requirement of specificity in obscenity laws. We argue first that the requirement does not suggest that 18 U.S.C. 1461 was unconstitutionally vague on its face before it was given a limiting construction. We next argue that *as applied* to petitioners Section 1461 complied with the *Miller* specificity requirement because the brochure concededly involved explicit sexual material which the jury found "patently offensive."

We also contend that the instruction to the jury to apply "national community standards" of obscenity did not make the statute vague. While *Miller* suggests that "contemporary community standards" should now be applied in federal obscenity prosecutions, it does not suggest that the use of a national standard—which was "correctly regarded" as "controlling" at

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the Commission Work—of the Commission on Obscenity and Pornography" (J.A. 163–166).

the time of trial (413 U.S. at 30)—was constitutionally deficient. In any event petitioners were not prejudiced by the application of a national standard.

2. The indictment, which tracked the language of 18 U.S.C. 1461, was sufficiently definite. "Obscene" is a legal term of art, and an indictment using that term necessarily warns a defendant that he will be tried under the judicial definition of that term.

3. The trial court's rulings on the obscenity issues were correct. The court properly excluded evidence of alleged "comparables" because expert testimony on the same issue was available and less likely to confuse the jury. The instruction that the petitioners' knowledge of the obscenity of the materials is irrelevant was proper. The government need only show that the petitioners were aware of the contents of the materials they mailed. The instruction on appeal to deviant groups was proper because there was support in the evidence of appeals to groups other than heterosexuals. The instruction on pandering was similarly proper because it was supported by petitioners' unsolicited distribution of tens of thousands of copies of the brochure and by the contents of the brochure itself.

4. The brochure (see Statement, *supra,* p. 4–5 and J.A. 92a) was plainly obscene. The jury viewed the materials and heard the expert testimony; its judgment should not be disturbed. Petitioners suggest that the brochure is not obscene because the *Illustrated*

Report was not obscene. But, as the court below said, their "premise is false" (481 F. 2d at 315), because there was no jury finding that the *Report* was not obscene.

5. The evidence supports the convictions (see Statement, *supra*, pp. 7–10 and Point V, *infra*, pp. 63, 68).

6. The refusal of the trial judge to dismiss the jury before hearing objections to his instructions, while technically improper, did not prejudice petitioners. There is no suggestion that the jury overheard the bench conference and, in any event, it concerned issues which were wholly legal rather than factual. The refusal to grant a continuance to replenish the jury wheel was proper because "young adults" were not systematically excluded by the jury lists. In any event, petitioners never showed that "young adults" (between 18 and 24) were a distinct group whose absence prejudiced them. The trial judge's *voir dire* of the jury was adequate. He asked questions relating to prejudice involving obscenity; his refusal to explore the jurors' religious beliefs was not an abuse of discretion.

7. There is no evidence that the Grand Jury was prejudiced against petitioners. The observation of the court below about "a supposition [of bias or prejudice] as to how the members [of the Grand Jury] may have reacted upon a view of the Brochure and Report" (481 F. 2d at 313) was simply a statement that petitioners' claim was "supposition," unsupported by any evidence.

ARGUMENT

I. *MILLER* v. *CALIFORNIA* DOES NOT RENDER 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO PETITIONER'S PRE-*MILLER* CONDUCT

A. INTRODUCTION

The principal issue in this case is what standards govern the review of federal obscenity convictions that occurred before but had not become final on the day *Miller* v. *California*, 413 U.S. 15, and related cases, were decided. The correct answer, we believe, was given in *United States* v. *Palladino* (C.A. 1), No. 72-1005, decided January 7, 1974, slip op., p. 2:

> We must now decide to what extent the standards articulated in the recent Supreme Court decisions dealing with state obscenity statutes apply to this federal case retroactively. The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests that to the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. * * * [Footnote omitted].

See also, *United States* v. *Thevis*, 484 F. 2d 1149 (C.A. 5), petition for a writ of certiorari pending, Nos. 73-1075, 73-1091.*

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* We do not, however, agree with the First Circuit's disposition of the "community standards" issue in *Palladino*, see *infra*, pp. 25-31.

Petitioners were tried under the then prevailing *Roth-Memoirs* definition of obscenity.[9] In most respects this definition imposed a substantially more stringent burden on the government to prove obscenity than the guidelines laid down in *Miller*.[10] The requirement in *Roth-Memoirs* of a finding of "appeal to the prurient interest" is not significantly different from the statement of that element in *Miller*. Manifestly the requirement of *Roth-Memoirs* that the materials be shown to be "utterly without redeeming social value or importance" imposed a greater burden on the government than showing that they "lack * * * serious literary, artistic, political, or scientific value" (*Miller, supra*, 413 U.S. at 24). Indeed it was avowedly to relieve the government of this constitutionally unnecessary and "virtually impossible to discharge * * *" burden of proof that the *Miller* standard was formulated (*id* at 22).

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[9] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413. "[U]nder the *Roth* definition 'as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value'." *Miller*, *supra*, 413 U.S. at 21 (quoting from *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 418).

[10] "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.

It is only with respect to the second element of obscenity in *Miller* that there is a difference which is arguably a limitation of the scope of prosecutions under *Roth-Memoirs*. *Miller* requires that the material in question depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state [11] law".[12] Since the requirement of specificity "creates protections not afforded by prior standards, these cannot be denied to [petitioners]" (*United States* v. *Palladino, supra,* slip op. at p. 2, see also, *id.* at p. 3).

However, as we will argue hereafter (*infra,* B), 18 U.S.C. 1461 has received an authoritative construction giving it the required specificity. *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7. Since petitioners' publication was well within the core meaning of the statute as it has now been limited, as applied to them the statute was not vague even before it received a limiting construction.

The second aspect of *Miller* which will require discussion is the recognition that a local community standard for judging obscenity passes constitutional muster

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[11] "[The *Miller*] standards are applicable to federal legislation." *United States* v. *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. 123, 130.

[12] As examples of "sexual conduct" which might be "specifically defined" in an obscenity law, the Court suggested (*Miller, supra,* 413 U.S. at 25):

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

(413 U.S. at 30–34). We will argue (*infra*, C) that, while the application of "contemporary community standards" is constitutionally permissible and preferable, the application of a national standard in this case did not make the statute vague or prejudice the petitioners.

B. THE FACT THAT 18 U.S.C. 1461 DID NOT CONTAIN A SPECIFIC DESCRIPTION OF LEWD SEXUAL CONDUCT DID NOT MAKE THAT STATUTE UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO PETITIONERS' CONDUCT BEFORE *MILLER*

In *United States* v. *12 200-Ft. Reels of Film, supra*, 413 U.S. at 130, n. 7, this Court limited the literal reach of 18 U.S.C. 1461 by construing the statutory terms "obscene", "lewd", etc. to reach only "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*, * * *."[13] While petitioners acknowledge that this construction precludes any future challenge to the statute on vagueness grounds (Pet. Br. 29), they also argue the converse: that prior to this limiting construction Section 1461 was unconstitutionally vague. This argument overlooks the repeated decisions of this Court prior to *Miller* sustaining Section 1461 and, more importantly, overlooks the fact that since the petitioners' conduct was well within the statute as now limited, it was not vague as applied to them.

1. In *Roth* v. *United States*, 354 U.S. 476, this Court upheld the constitutionality of 18 U.S.C. 1461 against a contention that "the statutes do not provide rea-

[13] The Court referred only to 19 U.S.C. 1305(a) and 18 U.S.C. 1462, but 18 U.S.C. 1461 uses the same statutory terms and would presumably receive the same construction.

sonably ascertainable standards of guilt * * *." In rejecting this claim the Court said:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. * * * "[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo,* 332 U.S. 1, 7–8. These words ["obscene", "lewd", etc.], applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark "* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *" [*id.* at 491].

Prior to *Miller and 12 200-Ft. Reels of Film,* the Court reaffirmed this holding in *United States* v. *Reidel,* 402 U.S. 351, 353–354.[14] Thus, at the time of petitioners' conduct and at the time of their trial, in the view of this Court, 18 U.S.C. 1461 provided ascertainable standards of guilt and was not unconstitutionally vague.

Nor did *Miller* or its companion cases suggest the contrary. At no point in *Miller* and its companion cases did this Court indicate that it was abandoning

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[14] As noted by Justice Harlan, speaking for the Court in *Manual Enterprises* v. *Day,* 370 U.S. 478, 483, "[T]he statute [1461] since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex."

the *Roth-Memoirs* standards because those standards made obscenity statutes unconstitutionally vague. See *United States* v. *Thevis,* 484 F.2d 1149 (C.A. 5); *United States* v. *One Reel of Film,* 481 F.2d 206 (C.A. 1); *United States* v. *Gordon and Fleisher,* Cr. No. 73–20 (D. Vt., February 20, 1974); *United States* v. *Guarino, et al.,* Nos. 7968, 7970–7972 (D. R.I., November 14, 1973); *United States* v. *Marks,* 364 F. Supp. 1022, 1026 (E.D. Ky.); *United States* v. *Dorfman and Roka Film Enterprises,* Nos. 181–73 and 331–73 (D. D.C., August 31, 1973). Rather, the Court concluded that *Memoirs* imposed greater burdens on the regulation of obscenity than were intended by the *Roth* majority. As the Court stated (*Miller, supra,* 413 U.S. at 21–22):

> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance." *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth,* the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.,* that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. * * *

This language hardly suggests that the Court viewed Section 1461, as construed by *Roth-Memoirs,* to be unduly vague. If anything the implication is that the *Roth-Memoirs* construction was unnecessarily strict, thereby depriving the government of constitutionally

valid convictions by imposing an "impossible" standard of proof.

Furthermore, the remands this Court ordered since *Miller*, in numerous pre-*Miller* federal obscenity convictions, to the courts of appeals for further consideration in light of *Miller*,[15] indicate that convictions under the *Roth-Memoirs* standards are not defective because of a vague statute or otherwise. If they were, the Court would have reversed or vacated those convictions.

2. We have already noted that to the extent that *Miller*'s specificity requirements create new protections for defendants, they should be applied in the review of non-final convictions, such as petitioners'. But this is not to say that before *Miller* Section 1461 was unconstitutionally vague on its face for failure to articulate the specific sexual conduct to be regulated.

In *Miller, supra*, 413 U.S. at 24, the Court held that regulation of obscene material was limited "to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state [or federal] [16] law, as written or authoritatively construed." The Court pointed out in a footnote that it was not holding all state obscenity statutes inadequate, and that existing statutes, "as construed heretofore or hereafter, may well be adequate," citing its own

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[15] See, *e.g.*, *Groner* v. *United States*, No. 72–1731 vacated and remanded, October 23, 1973; *Miller* v. *United States*, 413 U.S. 913; *Cangiano* v. *United States*, 413 U.S. 913; *Cote* v. *United States*, 413 U.S. 915; *United States* v. *Palladino*, 413 U.S. 916.

[16] "[*Miller*] standards are applicable to federal legislation." *United States v. 12 200-Ft. Reels of Film*, *supra*, 413 U.S. at 130.

construction of the federal statutes in *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7. *Miller, supra,* 413 U.S. at 24, n. 6.

In *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7, the Court said:

> *If and when* such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462 * * * [and 18 U.S.C. 1461], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California, ante,* at 25. * * * [Emphasis added.]

The Court's use of the words "[i]f and when" suggests that there has not yet been a "serious doubt" raised as to the vagueness of these terms as used in federal obscenity statutes. *United States* v. *Gordon and Fleisher, supra,* slip op. at p. 5.

If the asserted vagueness problems raised a "serious doubt" as to the facial validity of federal obscenity statutes, either before or as a result of *Miller,* this Court would have considered them in the two federal cases challenging the constitutionality of 18 U.S.C. 1462 and 19 U.S.C. 1305(a) decided together with *Miller.*[11]

The *Miller* examples of lewd sexual conduct which the Court incorporated into 18 U.S.C. 1461 by *12 200-Ft. Reels of Film* do not materially change the scope

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[11] *United States v. 12 200-Ft. Reels of Film, supra; United States* v. *Orito,* 413 U.S. 139.

of that statute. The proscribed specific "hard core" sexual conduct which the Court read into the obscenity statute was derived from those materials judicially found to be obscene (or non-obscene) in past cases. See *Miller, supra,* 413 U.S. at 27, 29; *Ginzburg* v. *United States,* 383 U.S. 463, 499, n. 3 (Justice Stewart dissenting); *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 and cases cited in footnote one (Justice Stewart concurring); *Manual Enterprises* v. *Day,* 370 U.S. 478, 489–490. Thus, the Court's action in *12 200-Ft. Reels of Film,* in reading specificity into the statute was simply in accord with the settled meaning of the statute.

In sum, there is no basis for concluding that 18 U.S.C. 1461 was void on its face before *Miller* was decided.

3. But even if the limiting construction of *Miller* and *12 200-Ft. Reels of Film* was needed to save the statute from facial invalidity, petitioners are in no position to complain, because the statute was clearly constitutional as applied to them. Although petitioners' advertisements were mailed before the limiting construction, they clearly fall within the class of "patently offensive representations * * * of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California* * * *" (413 U.S. at 130, n. 7).

The examples of proscribable representations given in *Miller,* include "[p]atently offensive representation * * * of ultimate sexual acts, normal or perverted, actual or simulated * * * [, and] of masturbation * * *

and lewd exhibition of the genitals."[13] It was stipulated at trial that the representations in the *Illustrated Report* were "sexually explicit material," including "pictures having to do with sexual activity between humans and animals" (J.A. 163–164). Since each of the pictures in the advertising brochure also appears in the *Report*, it is uncontested that the brochure depicts explicit sexual activities. Moreover, the jury specifically found that the representations were "patently offensive" (J.A. 238) as required under both *Roth-Memoirs* and *Miller*.

Since the jury resolved the issue of patent offensiveness against the petitioners, and since it is undisputed that the material includes depiction of explicit sexual acts and exhibition of the genitals, there is no need to resubmit to the jury the issue of whether the brochure contains patently offensive depictions of explicit sexual conduct. See *United States* v. *Cabbell*, 427 F. 2d 147 (C.A. 4); *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4), cf. *United States* v. *Capitol Meats*, 166 F. 2d 537 (C.A. 2), certiorari denied, 334 U.S. 812; *Crichton* v. *United States*, 92 F. 2d 224 (C.A. D.C.), certiorari denied, 302 U.S. 702.

4. The statute's specificity requirement fashioned by *Miller and 12 200-Ft. Reels of Film*, can be applied to petitioners' pre-*Miller* conduct without violating the due process right of fair warning recognized in *Bouie* v. *City of Columbia*, 378 U.S. 347. The Court in *Bouie* stated (378 U.S. at 352):

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[13] The *Miller* examples (413 U.S. at 25) are set out in note 12, *supra*, p. 16.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforseeable and retroactive judicial *expansion of narrow and precise statutory language*. * * * [Emphasis added.]

The *limiting* interpretation made by *12 200-Ft. Reels of Film* is not a "retroactive judicial *expansion* of narrow and precise statutory language" (378 U.S. at 352). Precisely the opposite is true. The application of the statute, as construed with more narrow and precise language, to petitioners' pre-*Miller* conduct, which was clearly a criminal offense under the pre-*Miller* construction of the statute, violates no due process right or *ex post facto* principle. Compare *Bouie, supra*, 378 U.S. at 353–354.

It is only a judicial construction which makes criminal conduct which was legal before a court's decision that invokes *ex post facto* considerations. But as we have pointed out, the substantive elements of the *Miller* test—which arguably expand the category of obscene material beyond the *Memoirs* formulation—have no applicability to petitioners' pre-*Miller* conduct. The specificity requirement—which arguably *narrows* the category of obscene material—does have application to petitioners' pre-*Miller* conduct. But giving petitioners the benefit of that limiting construction, the statute, as we have seen, was nonetheless properly applied to them.

C. THE FACT THAT THE JURY WAS INSTRUCTED TO APPLY "NATIONAL COMMUNITY STANDARDS" DID NOT MAKE 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONERS

In *Miller* this Court held that, in state obscenity prosecutions, the use of a statewide community standard of obscenity was "constitutionally adequate" (413 U.S. at 34). The Court also characterized "national standards" as "hypothetical and unascertainable" (413 U.S. at 31). From this, petitioners argue (Pet. Br. 29–33) that the trial court's charge, requiring the jury to apply "national community standards" (J.A. 238), rendered 18 U.S.C. 1461 unconstitutionally vague as applied to them.

1. In *Miller*, the Court held that the First Amendment does not require the use of a national standard of obscenity in a state obscenity prosecution (413 U.S. at 30–34). Since the First Amendment applies equally to the states and the federal government (*Stromberg* v. *California*, 283 U.S. 359, 368), it would appear that there is no First Amendment obstacle to the application of local community standards in federal obscenity cases. This conclusion is bolstered by the Court's summary of its holdings in *Miller, supra*, 413 U.S. at 36–37. The Court said: "In sum, we * * * hold that obscenity, is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U.S. 229] *supra*, at 230, and *Roth* v. *United States*, *supra*, at 489, not 'national standards'." The Court's citation of both *Kois*, a state case, and *Roth*, a federal

case, indicates that "contemporary community standards" should be applied in federal, as well as state, prosecutions.

If we correctly understand the implication of *Miller* to be that "contemporary community standards" should be applied in federal obscenity prosecutions, we agree entirely with that conclusion. But we do not understand *Miller* to hold that all the convictions which have been obtained under national standards of obscenity are constitutionally defective. In *Miller*, the Court said (413 U.S. at 30–31):

> a "national" standard of First Amendment protection enumerated by a plurality of this Court, was *correctly regarded* at the time of trial as limiting state [and federal] prosecution under controlling case law. [Emphasis added.]

To say that a national standard of obscenity was "correctly regarded" as "controlling" is not to imply that the use of such a standard was constitutional error. In fact, petitioners agree with us that the trial court was correct in applying a "national standard" (Pet. Br. 29). They argue, however, that use of such standards rendered Section 1461 unconstitutionally vague under the Fifth Amendment.

2. We first consider the preference of "contemporary community standards," before turning to the asserted vagueness of the national standard applied in this case (*infra*, 3).

The requirement of a national standard of obscenity has never commanded a majority in this Court. In *Roth* v. *United States*, 354 U.S. 476, 489, the Court did not designate the boundaries of the community

whose standards were to be applied. The Court first considered the issue of geographical boundaries of the relevant community in *Manual Enterprises* v. *Day*, 370 U.S. 478, 488. Mr. Justice Harlan, in an opinion joined only by Mr. Justice Stewart, said that, in a federal prosecution, the relevant community should be the nation. Next, in *Jacobellis* v. *Ohio*, 378 U.S. 184, 192–195, Mr. Justice Brennan, in an opinion joined only by Mr. Justice Goldberg, said that a national standard should also be applied to state obscenity prosecutions. Mr. Chief Justice Warren, joined by Mr. Justice Clark, dissented, believing that there were no provable national standards. 378 U.S. at 200.

Thus, the national community standard test prior to *Miller* rested on two minority opinions. In his dissent in *Ginzburg* v. *United States*, 383 U.S. 463, 479, Mr. Justice Black expressed his lack of certainty as to which geographical area was included in the "community" standard.

In *Miller*, the Court said (413 U.S. at 30):

> Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. * * *

The Court continued (*ibid.*):

> The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. * * *

These considerations in favor of the use of community standards would seem to be equally applicable to both state and federal prosecutions.

The Court's discussion recognizes that the demand upon juries to find and apply a national standard of obscenity is an historical anomaly. Traditionally juries have "draw[n] on the standards of their community" (413 U.S. at 30). They should be allowed to do so in obscenity cases unless there is compelling reason to ask them not to do so. In *Miller* the Court recognized that, however well-intentioned it was, the quest for a national standard had been "unrealistic" (413 U.S. at 30). The Court has, therefore, decided to return to a reliance on the traditional fact-finding methods of the jury, and hence to return to "community standards."

In our view the relevant community in federal obscenity prosecutions should be the federal judicial district. See *United States* v. *Groner*, 479 F. 2d 577, 581–583 (C.A. 5). Federal judicial districts do not always coincide with state lines, but the use of the judicial district as the relevant community is more realistic and practical than a state or the city where the court is sitting. The jurors in federal cases are drawn from a cross-section of the "community" in the judicial district (see 28 U.S.C. (Supp. 1972) 1861),

and are therefore familiar with the standards of that "community." Since, as noted in *Miller, supra,* 413 U.S. at 30, the jury has historically "draw[n] on the standards of their community * * *," the jurors in federal obscenity cases should be permitted to draw on those standards with which they are familiar, and not apply standards arbitrarily settled upon by geography and about which the jurors may know very little. This is especially important in view of the fact that no expert testimony is necessary to prove the standards. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49.

3. The recognition that the application of "contemporary community standards" more realistically effectuates First Amendment values does not entail the conclusion that all prosecutions applying a national standard of obscenity are void *ab initio.*

We have noted that, at the time of trial a national standard was "correctly regarded" as "controlling" (*Miller, supra,* 413 U.S. at 30). The *Miller* formulation may be viewed as a means of sharpening the fact-finding process of the jury. But it does not follow that all previous fact-finding was constitutionally deficient. There is no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard. Indeed, since *Miller* some courts of appeals have found that national standards are still ascertainable and appropriate in federal cases. In *United States* v. *Palladino, supra,* slip op. at p. 8, the First Circuit stated a preference for a national standard, then added:

> All this is not to say that evidence of national standards of prurient appeal and patent offensiveness will be unmarred by serious dispute. But neither can we say that such evidence will never be clear * * *. And the effort to identify a national standard of tolerance would seem to differ only in degree from the effort, upheld in *Miller* to identify a state-wide standard in such a large, populous, and variegated state as California.

Our submission is that the use of a national standard of obscenity, at least when supported (as it was here) by expert testimony, was not too vague for the jury to grasp and apply.

The Court's primary concern in using community standards is to assure that the material is not judged by the personal opinion of each juror, and that it is not judged by its effect on a particularly sensitive or insensitive person or group. *Miller, supra,* 413 U.S. at 33; *Mishkin* v. *New York,* 383 U.S. 502, 508–509; *Roth, supra,* 354 U.S. at 488–489. This concern is satisfied whether a local or a nationwide standard is used.

It is highly unlikely that the petitioners could have been prejudiced by the application of a national standard. The case was tried in the Southern District of California. Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole.

It is more reasonable to conclude that juries are always guided by their perception of their com-

munity's values and that the instructions to apply "national standards" do not markedly change that perception.

Accordingly, we submit that petitioners were not prejudiced by the application of a national standard. This is especially true in light of the material involved here, which is obscene under any standard. In short, if it were error not to apply a local standard in this case, the error was harmless.

D. NEITHER THE "UTTERLY-WITHOUT-REDEEMING-SOCIAL-VALUE" TEST NOR THE ABSENCE OF A MAJORITY OPINION SINCE ROTH RENDERED 18 U.S.C. 1461 UNCONSTITUTIONALLY VAGUE

Focusing on the question in the dissenting opinion of Mr. Justice Harlan in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 459 (cited in *Miller, supra*, 413 U.S. at 22) whether utterly without redeeming value, "has any meaning at all," petitioners argue (Pet. Br. 34–39), that this test and the "ad hoc" nonmajority decisions in obscenity cases prior to *Miller* made 18 U.S.C. 1461 vague and unworkable.

1. The rejection of the utterly-without-redeeming-social-value test in *Miller* was not because the test was vague. The Court in *Miller* rejected the test because it was not a part of the definition of obscenity approved in *Roth*, and because it placed too heavy a burden of proof on the prosecution. The Court stated (413 U.S. at 21–22):

> While *Roth* presumed "obscenity" to be "*utterly* without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the ma-

> terial is "*utterly* without redeeming social value". Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative * * * a burden virtually impossible to discharge under our criminal standards of proof. * * *

The fact that it is impossible or difficult for the prosecution to prove a negative does not render the definition of obscenity vague. Indeed, it is particularly ironic for the defendants to base a claim of statutory vagueness on the difficulty of the government making out its case against them.

The meaning of the utterly-without-redeeming-social-value test announced in *Memoirs* is found in *Roth* v. *United States*, 354 U.S. 476, 484, 487 and *Jacobellis* v. *Ohio*, 378 U.S. 184, 200:

> The portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of [the] freedom of speech and press. [*Roth, supra*, 354 U.S. at 487; footnote omitted.]
>
> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties * * *. [*Id.* at 484.]

In *Jacobellis, supra*, 378 U.S. at 191, the Court after citing portions of the above quotations from *Roth*, stated:

> It follows that material dealing with sex in a manner that advocates ideas, * * * or that has literary or scientific or artistic value or any

other form of social importance, may not be branded as obscenity and denied the constitutional protection.

The test announced in *Memoirs* incorporated this rationale into the standards for judging obscenity, in order to provide further protection from suppression of protected material. The Court's problem in *Miller*, therefore, was not with the vagueness of the test, but with the fact that it required the prosecution to prove the material *"utterly* without redeeming social value," which imposed "a burden virtually impossible to discharge under our criminal standards of proof." 413 U.S. at 22.

2. Petitioners contend that the *Roth-Memoirs* test for judging obscenity was "unworkable," in light of the Court's practice, adopted in *Redrup* v. *New York*, 386 U.S. 767, of reviewing obscenity convictions when at least five members of the Court, applying their separate tests, found the material to be protected by the First Amendment. This Court, however, never stated that the *Redrup* approach was necessitated because the *Roth-Memoirs* test was "unworkable."

The Court stated in *Miller, supra*, 413 U.S. at 22, n. 3, that "[i]n the absence of a majority view," the Court began the practice in *Redrup*. This statement can not be interpreted to mean that the *Roth-Memoirs* standards were "unworkable;" they had not been overruled, and therefore, they were still the law and continued to guide lower courts, and people in general, in judging obscenity. Indeed, an analysis of *Redrup* indicates that at least three Justices subscribed to the *Roth-Memoirs'*

standards,[19] two did not believe that obscenity could be constitutionally regulated,[20] and two others followed the original *Roth* formulation absent the "utterly without redeeming social value" test of *Memoirs*.[21] Accordingly, persons whose conduct did not transgress the *Roth-Memoirs* standards could not be constitutionally convicted of violating obscenity laws, since at least five Justices would find their actions constitutionally protected.

II. THE INDICTMENT WAS SUFFICIENTLY DEFINITE

Petitioners argue (Pet. Br. 39–45) that the indictment was insufficient because it failed to inform them of the charges. This argument is simply an extension of petitioners' claim that the terms of the statute are vague and ambiguous; for it is from this that they contend that the indictment, framed in the language of the statute, does not advise them of the offense charged. Since we have shown that the statute is not vague, an indictment drafted in its terms is sufficiently definite.

1. At the time that petitioners were indicted the term "obscene," as used in the statute, had been de

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[19] Chief Justice Warren, Justices Brennan and Fortas adhered to the *Roth-Memoirs* formulation. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 414.

[20] Justices Black and Douglas believed obscenity was absolutely protected by the First Amendment. See *Ginzburg* v. *United States*, 383 U.S. 463, 476, 482 (dissenting opinions).

[21] Justices Clark and White followed the *Roth* formulation but did not accept the "utterly without redeeming social value" test. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 441, 461 (dissenting opinions).

fined by this Court in a number of decisions and had a definite meaning. "Obscene" is therefore a legal term of art and not merely a generic or descriptive term. *United States* v. *Thevis,* 484 F. 2d 1149, 1152 (C.A. 5). Accordingly, charging a violation of Section 1461 in the terms of the statute was sufficient. *United States* v. *Thevis, supra*; *United States* v. *Luros,* 243 F. Supp. 160, 166–167 (N. D. *Iowa*), certiorari denied, *sub nom. Luros* v. *Hanson, District Judge,* 382 U.S. 956.

The component elements of "obscene" do not have to be alleged in the indictment because they merely constitute the definition of a legal term. This case is wholly unlike *Russell* v. *United States,* 369 U.S. 749, relied on by petitioners. In *Russell,* the indictment charged in the words of the statute that the defendants refused to answer questions that "were pertinent to the question then under inquiry" by a committee of Congress (*id.* at 753). The Court held the indictment to be insufficient because it did not state the subject which was under inquiry, a question of fact. Here, the allegation that the materials are obscene simply means the materials come within the legal definition of obscenity.

As the court in *United States* v. *Luros, supra,* said, distinguishing *Russell* (243 F. Supp. at 167):

> The definition of obscenity is a question of law rather than fact. Unlike the question under inquiry before the Congressional committee the definition of obscenity does not change with each indictment.

The indictment here, framed in the terms of the statute, charged the mailing of an "obscene, lewd,

lascivious indecent, filthy and vile advertisement' (J.A. 14–31). The indictment was sufficient since i alleged all the elements of the offense and the specifi facts in support thereof, fairly informed petitioner of that which they had to prepare to meet in their de fense, and would enable them to plead an acquittal o a conviction in lieu of future prosecutions for the same offense. *Hagner* v. *United States,* 285 U.S. 427.

2. Petitioners further contend that this Court's re mand in *United States* v. *Orito,* 413 U.S. 139 to the district court for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California,* and *12 200-Ft. Reels of Film* indicates that the sufficiency of the indictment involved here is in question. No such inference can be drawn from the Court's action.

Orito had come to the Court on direct appeal from the district court's summary dismissal of the indictment on the grounds that the statute (18 U.S.C. 1462) was unconstitutional.[22] This Court upheld the statute. Since the district court had not gone beyond the face of the statute in considering the indictment, the only appropriate disposition was to remand to the district court for reconsideration of the sufficiency of the indictment. And since *Miller* and *12 200-Ft. Reels of Film* had incorporated new specificity requirements into the statute, and upheld its constitutionality on those grounds, it would be necessary for the district court to consider the sufficiency of the indictments

[22] The district court held the statute was unconstitutionally overbroad because it did not distinguish between public and non-public transportation of obscene materials.

in light of those cases. On the other hand, in those cases in which obscenity convictions had already been affirmed by the courts of appeals, the Court merely remanded to the courts of appeal for reconsideration, without any indication that the indictments might be vulnerable. (See cases cited in footnote 5, *supra*, p. 20.).

III. THE RULINGS AND INSTRUCTIONS OF THE TRIAL COURT ON THE OBSCENITY ISSUES WERE CORRECT

A. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING ALLEGEDLY COMPARABLE MATERIALS

In *Smith* v. *California*, 361 U.S. 147, 172, Justices Frankfurter and Harlan observed that a litigant in an obscenity prosecution should be allowed to introduce evidence on the prevailing literary and moral community standards. Justice Frankfurter believed that this should be done with expert testimony, while Justice Harlan would not limit the particular kind of evidence, although he recognized that "it may be considered that expert testimony is the most convenient and practicable method of proof * * *." *Id.* at 172. Recently, in *Kaplan* v. *California*, 413 U.S. 115, 121, the Court reiterated that the prosecution need not produce any ancillary evidence of obscenity, but held that "[t]he defense should be free to introduce appropriate expert testimony."

In the trial of this case, petitioners' right "to enlighten the judgment of the tribunal * * * regarding the prevailing literary and moral community standards * * * through qualified experts" (Justice Frankfurter concurring in *Smith*, *supra*, 361 U.S. 164–165) was

fully permitted. Petitioners' four expert witnesses testified at great length with respect to every aspect of the standards as applied to the materials involved (see *e.g.*, R.T. 3518–4318). Petitioners nevertheless contend (Br. for Pet. Kemp, *et al.* 64–76) that their defense was severely hampered by the trial court's exclusion of three categories of allegedly comparable material: (1) materials which had received second-class mailing privileges, (2) materials which had previously been the subject of litigation and had been found to be "constitutionally protected," and (3) materials openly available on newsstands (R.T. 1963).[23] The trial court rejected these materials because "primarily, they tend to confuse the jury" and because their admission into evidence "would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom" (J.A. 158).

The trial court's ruling represented a proper exercise of its duty to assure that the jury is not inundated with a mass of evidence, the relevance and probative value of which is highly questionable, and which is therefore likely to confuse. Moreover, the proffered evidence was largely immaterial and, with respect to the tendered investigation results, constituted an unwarranted invasion into the province of the jury.

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[23] Petitioners also attempted unsuccessfully to introduce into evidence the results of an investigation conducted by a student at San Diego University. The investigation results, derived primarily from responses to a questionnaire, purported to show that a majority of the San Diego residents interviewed believed that the *Illustrated Report* should be read and that the advertisement should be available to the public (R.T. 3923–3938).

1. The availability of similar materials on newsstands is not necessarily relevant to the issues on trial. The availability of such materials indicates only that there is a market for them. Availability in the market place, however, does not demonstrate acceptability by the community. See, *e.g., United States* v. *Manarite,* 448 F. 2d 583 (C.A. 2), certiorari denied, 404 U.S. 947.[24]

Moreover, the defense experts testified at great length with respect to their knowledge of contemporary community standards, concluding that the brochure did not appeal to prurient interests, was not patently offensive and was not without social value. Testimony that similar materials were available—even assuming that it was somehow relevant—would merely have been cumulative. As the court below noted, "One portrayal of female genitalia is quite likely to be comparable to another, * * * and so on." 481 F. 2d at 320. It is far less time consuming, more productive, and less confusing to the jury, if the experts testify only as to the subject materials.

2. Petitioners' offer of a magazine, "Nude Living, No. 63," was properly rejected. The foundation alleged as the basis for its admissibility was that the magazine had received a second-class mailing privilege (J.A. 212–213). The determination whether a publica-

[24] Availability may also point up the difficulties inherent in enforcement of obscenity laws; the consequence of these difficulties may be the availability of obscene materials. It by no means follows that the availability reflects the desires or standards of the community.

tion is entitled to distribution as second class mail, however, is made on the basis of essential objective factors—*i.e.*, that the publication (1) "is regularly issued at stated intervals as frequently as four times a year * * *; (2) is issued from a known office of publication; (3) is formed of printed sheets; (4) is originated and published for the dissemination of information of a public character, or devoted to literature, the science, arts, or a special industry; and (5) has a legitimate list of subscribers." 39 U.S.C. (1964 ed.) 4354; and, see, 39 U.S.C. (1964 ed.) 4351; *et seq;* 39 CFR 132.2. With respect to the fourth statutory requirement, this Court has held that the standard gives postal officials no powers of censorship. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. Thus, the fact that a publication has a second class mailing privilege creates no presumption that particular material is not obscene. The trial court therefore acted properly in excluding this evidence.

3. Finally, petitioners urge that they should have been permitted to introduce as comparable materials a film and two magazines which this Court apparently concluded were not obscene. *Pinkus* v. *Pitchess*, 429 F. 2d 416 (C.A. 9), summarily affirmed *sub nom. California* v. *Pinkus*, 400 U.S. 922; *Burgin* v. *California*, 404 U.S. 806 (summary reversal on authority of *Redrup* v. *New York*, 386 U.S. 767). No determination whether the film and the two magazines were truly comparable to the obscene brochure was here made;[23]

[23] In *Pinkus*, the Ninth Circuit observed that the "worst" aspect of the film was the feigned portrayal of self-induced

the trial court excluded all such alleged comparables on the ground that their introduction would confuse the jury and that the probative value was slight. This ruling was proper, since the impact of such evidence upon the jury is the paramount consideration in determining its admissibility.

If the materials are truly comparable, it is more likely that this Court's judgment with respect to them would serve as an imprimatur which would unduly influence the jury's deliberations and cause the litigation to be dominated by ancillary matters. Even if a publication had been found non-obscene at one trial, "a wholly different result might be reached in a different setting" (*Roth, supra,* 354 U.S. at 495, Warren, C.J., concurring). While it may be true that in the line between the obscene and the non-obscene may sometimes be a fine one, it is the jury's to draw in the first instance.[26] A proper respect for that function, as well as the very real possibility that evidence of this

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sexual gratification by a naked female. 429 F. 2d at 417. Here, on the other hand, the "worst" of the obscene photographs portrayed an act of fellatio involving a woman and an animal.

In order to have allegedly comparable materials admitted into evidence, two factors must coalesce: (1) a proper foundation for the admissibility of such evidence, and (2) proof that the proffered material is in fact truly comparable. *Womack* v. *United States*, 294 F. 2d 204 (C.A. D.C.), certiorari denied, 365 U.S. 859; *United States* v. *Jacobs*, 433 F. 2d 932 (C.A. 9).

[26] Where materials alleged to be obscene are fully comparable to materials which this Court has found to be constitutionally protected, the interests of those in petitioners' position are adequately served in this respect by the stringent appellate review characteristic of this area.

Court's pronouncements with respect to comparable materials would confuse the jury, fully supports the trial court's exclusion of the proffered evidence here.[27]

It is the trial court's responsibility to prevent unwarranted interferences. The trial court properly excluded the allegedly comparable material from evidence, because it would tend to confuse the jury (*Books, Inc.* v. *United States*, 358 F. 2d 935 (C.A. 1), reversed on other grounds, 388 U.S. 449, *Burch* v. *Reading Co.*, 140 F. Supp. 136 (E.D. Pa.), affirmed, 240 F. 2d 574 (C.A. 3), certiorari denied, 353 U.S. 965), and was of only minimal probative value. *Womack* v. *United States*, *supra*. The trial court stated that petitioners' proffered "comparable" evidence would "[s]erve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom" (J.A. 158). The admissibility

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[27] There is another, related, consideration which militates against a rule requiring the admission of comparable materials which the courts have concluded are entitled to protection. Given such a rule, trial courts would understandably be reluctant to exclude materials which were arguably comparable. The question of comparability is a particularly delicate one:

"It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity, containing excerpts from recognized works of art." (*United States* v. *Ginzburg*, 224 F. Supp. 129, 135–136 (E.D. Pa.), affirmed, 338 F. 2d 12 (C.A. 3), affirmed, 383 U.S. 463.)

Trial courts, under a compulsion to err on the side of caution, could be expected to admit much evidence which would not only confuse the jury and unduly inhibit its proper function, but which would also render comparability itself a major, if not dispositive issue.

of such evidence is within the discretion of the trial court. *United States* v. *Jacobs, supra; Schindler* v. *United States,* 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Cotton* v. *United States,* 361 F. 2d 673 (C.A. 8); *Skogen* v. *Dow Chemical Company,* 375 F. 2d 692 (C.A. 8).

Finally, the survey conducted by a student at San Diego State University, of the reactions of people in the San Diego area to the *Illustrated Report* and the brochure, was properly excluded. Cf. *United States* v. *Manarite, supra,* 448 F. 2d at 593. It was the jury's function to evaluate the brochure in terms of the applicable standards, and the survey was, in effect, an attempt to have it evaluated by others, outside the supervision of the court and without the opportunity for cross-examination.

B. THE GOVERNMENT WAS NOT REQUIRED TO PROVE THAT THE DEFENDANTS KNEW THE MATERIALS WERE OBSCENE

Petitioners contend (Br. for Pet. Kemp, *et al.* 18–50) that the crime of mailing obscene materials in violation of 18 U.S.C. 1461, requires proof that the defendant knew the materials were obscene. The statute does not require such proof and it is not constitutionally required. The proper test is whether petitioners were aware of the contents of the materials mailed.

1. The relevant provisions of 18 U.S.C. 1461 provide that, "[w]hoever knowingly uses the mails for the mailing * * * of anything declared by this section * * * to be non-mailable * * *" commits a crime. The term

"knowingly," as a description of the requisite mental element, has appeared in each of the predecessor acts going back to the codification of the postal laws in 1872.[28] While there is no legislative history indicating the nature of the knowledge required, Congress has reenacted this statute numerous times, in essentially the same form, in the face of a decision by this Court (*Rosen* v. *United States*, 161 U.S. 29) and a number of decisions in lower federal courts (see, e.g., *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Knowles* v. *United States*, 170 Fed. 409 (C.A. 8); *Burton* v. *United States*, 142 Fed. 57 (C.A. 8)) that the required knowledge is only of the contents of the materials, and that the defendant's good faith belief in the scientific or social value, or non-obscenity, of the materials is immaterial.[29]

2. The Constitution does not require proof that the defendant was aware that, from the perspective of an average person, the material was obscene under the *Roth-Memoirs* standards (Br. for Pet. Kemp, *et al.* 35, 41). Petitioners challenge the court's instruction

[28] See Act of June 8, 1872, 17 Stat. 283, 302; Act of March 3, 1873, 17 Stat. 598, 599; Act of July 12, 1876, 19 Stat. 90; Act of September 26, 1888, 25 Stat. 496; Act of May 27, 1908, 35 Stat. 416; Act of March 4, 1909, 35 Stat. 1088, 1129; Act of March 4, 1911, 36 Stat. 1327, 1339; Act of June 25, 1948, 62 Stat. 683, 768; Act of June 28, 1955, 69 Stat. 183; Act of August 28, 1958, 72 Stat. 962; Act of January 8, 1971, 84 Stat. 1973, 1974.

[29] Congress has shown its sensitivity to court decisions affecting this statute. The 1958 amendment (72 Stat. 962) changed the terminology to provide for continuing offenses by "use of the mails" instead of by "deposit for mailing," in light of court decisions construing the section as providing for prosecution solely at the place of deposit. See S. Rep. No. 1839, 85th Cong., 2d Sess.

that their "belief as to the obscenity or nonobscenity of the material is irrelevant" (Br. for Pet Kemp, *et al.* 10–14; J.A. 235–236, 259–261).[20] We submit that the

[20] The court charged the jury as follows (J.A. 235–236):

"* * * [T]he crime charged in this case is a serious crime which requires proof of specific intent before the Defendants can be convicted.

"Specific intent, as the term implies, means more than a general intent to commit the act. To establish specific intent, the Government must prove the Defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

* * * * *

"The requirement of knowledge in this case applies * * * to the Defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required. That is to say, it must be proven beyond a reasonable doubt that:

* * * * *

"* * * [T]hey had knowledge of the character of the materials.

* * * * *

"You must be satisfied beyond a reasonable doubt that the Defendants were aware of the character and the nature of the materials alleged to have been mailed * * *.

"The Defendants' belief as to the obscenity or non-obscenity of the material is irrelevant. * * *"

With the exception of an instruction on specific intent, which was in substance incorporated in the court's charge, the various instructions on knowledge proffered by petitioners were refused. Petitioners' position with respect to the knowledge required is reflected in their proposed instruction No. 54, which read in pertinent part:

"* * * [T]he proof must show, beyond a reasonable doubt, that the defendants knew that the material here involved patently offended contemporary standards, and went substantially beyond customary limits of candor; and, in addition, knew that the dominant theme of the material, to the average

trial court's instructions on knowledge were consistent with constitutional requirements.

In *Rosen* v. *United States,* 161 U.S. 29, the question was whether one could be convicted of mailing obscene matter "unless he knew or believed that such [material] could be properly or justly characterized as obscene * * *" (id. at 41). In rejecting this requirement, the Court stated (161 U.S. 41–42):

> The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene * * * was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene * * * was recognized as the test for determining whether the statute has been violated. * * *

In *Smith* v. *California,* 361 U.S. 147, the Court considered a Los Angeles municipal ordinance which

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person applying contemporary standards, taken as a whole, appeals to prurient interest; and, in addition, knew that the material was without ideas and utterly without redeeming social importance" (J.A. 72).

made the mere possession of obscene materials a crime and thus, in effect, provided for strict liability. The statute, in effect, put each bookstore owner under an obligation to make himself aware of the contents of every book in his shop (*id.* at 153). The Court found that this unreasonable demand would become an undue restriction on the public's access to reading matter (*id.* at 153–154). Therefore, consistent with prior law (*id.* at 153, n. 9), the Court held that the ordinance could not constitutionally eliminate the scienter requirement altogether, and that the bookseller must be shown to have "knowledge of the contents of the book" before he can be prosecuted for carrying it in his store (*id.* at 153). The Court refrained, however, from spelling out "what sort of mental element is requisite to a constitutionally permissible prosecution * * *." (*id.* at 154).

In *Manual Enterprises* v. *Day,* 370 U.S. 478, allegedly obscene materials had been declared by the Post Office Department to be non-mailable, under 18 U.S.C. 1461. The ruling of the Post Office was based on alternative determinations that the magazines (1) were themselves "obscene," and (2) contained advertisements for obtaining obscene matter. The Court determined that the magazines were not obscene. In considering whether the magazines were non-mailable because they contained advertisements for obtaining obscene matter, the Court held that proof of knowledge by the magazines' publishers that the publication contained such advertisements was required (*id.* at 492). The Court concluded that the evidence was totally deficient because (*id.* at 494–495):

> [a]t best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same [non-obscene] character, and with the same purposes, as those reflected in their own magazines.

A publisher who has no knowledge that his advertiser is offering obscene materials cannot be held responsible for them. This is all the case stands for, and dicta relied on by petitioners (Br. for Pet. Kemp, *et al.* 30) are not controlling here, where petitioners themselves were engaged in mailing obscene material.

In *Mishkin* v. *New York*, 383 U.S. 502, the Court found that the state's obscenity statute had been interpreted by the state court to require knowledge defined in these terms:

> A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised * * * [citing *People* v. *Finkelstein*, 9 N.Y. 2d 342, 344–345, 174 N.E. 2d 470, 471]. [Court's emphasis; *id.* at 510.]

The Court characterized this definition of the knowledge requirement as "stringent" (*id.* at 507, n. 5). Since the statute satisfied the requirement, the Court again found it unnecessary to precisely define "'what sort of mental element is requisite to a constitutionally permissible prosecution'" (*id.* at 511).

Accordingly, while the Court has not directly spoken to the precise issue since *Rosen, supra*, it has not departed from the *Rosen* rationale. Thus, the

decision in *Smith*, focusing as it did upon the requirement that one charged in an obscenity prosecution be aware of the contents of the materials, served to reaffirm the Court's construction of the knowledge requirement announced in *Rosen*.

This Court's decisions indicate that an awareness of the contents of the alleged obscene materials is sufficient to satisfy the Constitutional purposes which underlie the requirement of knowledge. Obscenity is "only material whose indecency is self-demonstrating" *Manual Enterprises* v. *Day*, *supra*, 370 U.S. at 487. As Mr. Justice Frankfurter observed in his concurring opinion in *Smith*, the standard of proof required to show the necessary mental element in obscenity prosecutions is a practicable one (361 U.S. at 164):

> [T]he proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity.

A requirement that the prosecution must prove a defendant's knowledge of the *legal status* of the materials he sells would impose an impossible and unrealistic burden on prosecutions. Obscenity is a legal conclusion which entails the application of appropriate standards from the perspective of an average person in order to determine whether materials, are, beyond a reasonable doubt, obscene. As long as a defendant knows the general character of the materials involved he cannot claim that he was unaware that his conduct might be illegal. There is no reason why

he should also be required to know the materials meet the current judicial standards of obscenity.

Of course, obscenity is sometimes an elusive concept, and persons who have knowledge of the contents and character of the materials may not know with absolute certainty whether the materials will be held legally obscene. Indeed, as Mr. Justice Frankfurter recognized in his concurring opinion in *Smith* v. *California*, 361 U.S. 147, 164, the regulation of obscenity "will carry with it some hazard to the dissemination by a bookseller of non-obscene literature." As Mr. Justice Holmes stated in *United States* v. *Wurzbach*, 280 U.S. 396, 399, however: [21]

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familar to the criminal law to make him take the risk. * * *

In sum, the definition of knowledge the district court used in its instructions comported with constitutional requirements. The district court instructed that the crime required specific intent; that the government had to prove petitioners knowingly did an act the law forbids, purposely intending to violate the law; that petitioner had to have knowledge as to the contents of the envelopes and packages; and that they had to

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[21] The cases cited by petitioners (Br. for Pet. Kemp, *et al.* 35–36) all involve statutes requiring a specific knowledge of a fact which is objectively and quantitatively ascertainable.

know the character and nature of the materials (J.A. 235-236). No more was required.[32]

C. THE COURT'S INSTRUCTIONS WITH REGARD TO THE PRURIENT APPEAL OF THE MATERIALS TO SEXUALLY DEVIANT GROUPS WERE PROPER

The government's evidence and the court's instructions were in compliance with the holding in *Mishkin* v. *New York*, 383 U.S. 502, that the prurient appeal requirement must be adjusted "to social realities by permitting the appeal of this type of material [appealing to sexual deviates] to be assessed in terms of the sexual interests of its intended and probable recipient group; * * *" (*id.* at 509).

The government introduced expert testimony that a number of pictures contained in the *Illustrated Report* appealed to the prurient interest of various clearly defined and specified groups, such as homosexuals, group sexual deviants, sadists, masochists, and zoophiliacs (R.T. 1693–1710).[33] The testimony about

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[32] Numerous lower court decisions have upheld a similar test of scienter. See, *e.g.*, *United States* v. *West Coast News Co.*, 357 F. 2d 855, 862 (C.A. 6), reversed on other grounds, *sub nom. Aday* v. *United States*, 388 U.S. 447; *United States* v. *Mishkin*, 317 F. 2d 634, 637 (C.A. 2), certiorari denied, 375 U.S. 827; *Kuhn* v. *United States*, 300 F. 2d 78, 86 (C.A. 5), certiorari denied, 369 U.S. 859; *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938.

[33] This evidence was not at variance with the government's answer to the request for a Bill of Particulars. Petitioners specifically asked whether, "[I]t is claimed that the advertisements * * * appeal to the prurient interest of the average person in the Nation as a whole" (J.A. 36). We answered, "[I]t is implicit in an allegation of obscenity * * * that such advertisements appeal to the prurient interest of the average person" (J.A. 46). The government proof was not at variance

deviant groups concerned certain pictures in the *Illustrated Report*, similar to those in the advertisement, and two of which actually appeared in the advertisement (R.T. 1700, *Illustrated Report*, plate XVII). The trial court properly instructed the jury that, "The materials here involved must be measured by its appeal to the average adult * * * determined by the synthesis of the entire community * * * and not by young persons or those persons highly susceptible thereto" (J.A. 239). The court also stated (J.A. 239-240):

> In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group.
>
> An example of a group not sufficiently defined would be one labeled as sexually immature. I suppose one clearly defined would be homosexuals.

This instruction properly set forth the *Mishkin* test. But since the *Illustrated Report*, and to a lesser extent, the advertisement, contained a variety of material appealing to a number of prurient interests of various groups (R.T. 1747–1748), the court gave the following cautionary instruction (J.A. 240–241):

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with this answer and the answer did not preclude the introduction of evidence of the material's prurient appeal to sexually deviant groups. At pre-trial, the government made clear its intention to show that the material appealed to the prurient interest of sexually deviant groups (R.T. 29–30, 40–43). As held by the court below, there was no prejudice, in any event, because petitioners' experts were prepared to and did testify at length on the material's lack of prurient interest to sexually deviant groups. 481 F. 2d at 322.

It is not necessary for satisfaction of the prurient appeal requirement that you find one specific type of sexual activity to constitute the dominant theme of the materials under consideration. The prurient appeal requirement is satisfied if you find the dominant theme of the materials to be one of an appeal to an inordinant, shameful, morbid, degrading, unhealthy and unwholesome interest in sex, and details concerning sex, regardless of the type of group to which the appeal is made.

There are depicted throughout the materials under consideration, various sexual activities that may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant.

You need not limit your inquiry to whether the dominant theme of the material appeals to the prurient interest in sex of the average person. You may also consider whether some of the materials involved are designed for a clearly defined deviant sexual group, and whether such material appeals to the prurient interest in sex of the members of that group.

Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense.

Petitioners contend (Pet. Br. 46–48) that this instruction was erroneous because it allowed the jury to measure the advertisement by its appeal to the pru-

rient interest of the average person and its appeal to the prurient interest of a clearly defined deviant group. The court was not in error in so instructing the jury. The *Illustrated Report* and the advertisement contained materials appealing to the prurient interest of a number of deviant sexual groups, as well as that of the heterosexual person. Accordingly in order to determine whether, as a whole, it appealed to prurient interest, its prurient appeal to all groups had to be considered and measured by the jury (see the government's explanation of this position at trial, R.T. 1741–1745).

Indeed, otherwise, persons could escape the obscenity laws by combining in a single book or advertisement some materials that appeal to heterosexual persons and others that appeal to sexually deviant groups. Neither Congress nor this Court intended such a result. Indeed, this Court in *Miller* apparently interpreted *Mishkin* to contemplate an instruction such as the trial court gave (413 U.S. at 33):

> As the Court made clear in *Mishkin* v. *New York,* 383 U.S. at 508–509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, *so far as material is not aimed at a deviant group* it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. * * * [emphasis added].

Thus, material aimed at sexually deviant groups should be measured by its prurient appeal to those groups. In the case at bar, material in one book and

one advertisement was aimed at a variety of sexually deviant groups as well as at heterosexual persons. It was therefore incumbent on the government to introduce evidence and for the court to instruct the jury on the appeal of the book and advertisement to both "normal" persons and sexually deviant groups."[34]

D. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON PANDERING

1. Pandering was not charged in the indictment because it is not an element of the offense; rather, it is evidence which in a close case may tip the balance to show obscenity. *Ginzburg* v. *United States,* 383 U.S. 463, 474; *United States* v. *Palladino,* 475 F. 2d 65, 70-71 (C.A. 1), vacated and remanded in light of *Miller* v. *California,* 413 U.S. 916; *Milky Way Productions, Inc.* v. *Leary,* 305 F. Supp. 288, 294 (S.D. N.Y.) affirmed *per curiam sub nom. New York Feed Co.* v. *Leary,* 397 U.S. 98. The trial court carefully instructed the jury that obscenity was to be determined by the basic (*Memoirs*) test, but that if it found this to be a close case, it could consider pandering to assist

[34] Petitioners also seek to raise an issue neither presented in their petition, nor before the court below. They contend (Pet. Br. 50-52) that the trial court failed to instruct the jury that it must measure prurient appeal by a national standard. Since the issue was not raised in the petition, it is not properly before the Court, and should not be considered. *Irvine* v. *California,* 347 U.S. 128, 129-130; Rule 23(1)(C) of the Supreme Court Rules. In any event, the instruction (J.A. 238) followed the *Memoirs* definition of obscenity word for word. *Memoirs, supra,* 383 U.S. at 418. The district court also explained that, "The average adult is, of course, determined by the synthesis of the entire community, including persons of all sexes, religions, nationalities, creeds, ages, and etc. * * *" (J.A. 239). This was sufficient under *Roth-Memoirs* standards.

in the decision (J.A. 245). Consequently, petitioners were not, as they allege (Pet. Br. 52), convicted of pandering.

2. Contrary to petitioners' contention (Pet. Br. 54-56), Congress did not authorize persons to pander obscene advertisements by enacting 39 U.S.C. 3008.[a] By this statute, Congress simply gave the householder the means to insulate himself from advertisements that offer for sale matter "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," by instructing the Post Office to order the sender to refrain from mailing any further advertisements to that householder. 39 U.S.C. 3008(a), (b). While Congress left it to the householder to decide whether he wanted to receive "objectional materials," it did not take away the government's right to prevent the dissemination through the mails of obscene materials, including advertisements. In short, Congress did not equate sexually provocative "pandering advertise-

[a] 39 U.S.C. 3008 provides, in pertinent part:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees."

ments" with obscene pandering advertisements; and, although the former may be sent through the mails so long as there is no complaint, the latter may not. See 39 U.S.C. 3011(e).

3. The record contains ample evidence of pandering with regard to the advertisements. (The advertisement was adequately described by the court below, see *supra*, pp. 4–5 and is reproduced in the appendix (J.A. 92a).) Its predominant feature is a full page collage of obscene pictures. On the other side of the page the facsimile of the *Illustrated Report* cover emphasized the words "Illustrated Pornography" by setting them off in red and blue letters from the other words printed in black letters. The advertisement is dominated by the obscene pictures, with very little written matter.

The evidence showed that at least 55,000 of these unsolicited advertisements were sent out by a mailing service indiscriminately across the nation to unsuspecting persons, many of whom found the material objectionable (J.A. 124; 101–122). Applicable here is the summary of pandering evidence (with regard to advertisements) in *Miller* v. *United States*, 431 F.2d 655, 658–660 (C.A. 9), vacated and remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 913:

> The volume of circulation of this material, the indiscriminate possible market to which it was disseminated, the character of the enclosures all indicate the type of pandering which was held to support the finding of obscenity in *Ginzburg* * * *.

4. The propriety of the court's pandering instruction is even clearer when it is considered that the advertisement was being evaluated not only as a document charged as obscene in and of itself, but also as an advertisement of the *Illustrated Report*, an obscene book. This is not to suggest, of course, that pandering cannot be relevant with respect to the obscenity of the advertisement iself. As stated in *United States* v. *Pellegrino*, 467 F. 2d 41, 46 (C.A. 9) about an alleged obscene advertisement:

> We cannot say, however, that the question of pandering is wholly irrelevant. Pandering advertising may well forfeit an otherwise available claim of redeeming social value. Further it may cast light on the question whether the dominant theme of the advertising brochure itself is an appeal to a prurient interest in sex.

The pandering instruction was proper in the light of the entire charge and the evidence.

IV. THE JURY CORRECTLY DETERMINED THAT THE BROCHURE WAS OBSCENE

The jury properly found that the advertisement is obscene. This decision was reached only after the jury had examined the materials, heard extensive expert testimony from both sides on the obscenity of the brochure under *Roth-Memoirs* standards, and been carefully and properly instructed by the trial court on those standards. The jury's decision was painstakingly arrived at and obviously discriminating in that it found the brochure obscene but did not reach a deci-

sion on the *Illustrated Report*. This Court recently pointed out in *Miller, supra,* 413 U.S. at 26, that such decisions are properly for the jury:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. [Footnote omitted.]

Petitioners argue (Pet. Br. 58–61) that because the jury did not reach a decision on the counts dealing with the *Illustrated Report,* it must be presumed to be non-obscene and protected by the First Amendment. From this premise, they conclude that since the brochure fairly advertised the *Report,* the brochure must also be non-obscene.

1. As the court below held, "The premise is false. The jury made no finding on the charged obscenity of the Report." 481 F. 2d at 315. Since no decision was made on the counts involving the *Illustrated Report,* and since there are any number of reasons for the jury's inability to reach a decision, no inference as to the *Report's* obscenity may be drawn.

We need not second-guess the jury as to the grounds on which it distinguished the two items, because it has long been the rule that consistency in the verdict is not required. *Dunn* v. *United States,* 284 U.S. 390; *United States* v. *Carlson and Truax,* No. 73-1519 (C.A. 9, August 27, 1973) (memorandum opinion in obscenity case), petition for certiorari

pending, No. 73–528; *United States* v. *Fiorella*, 468 F. 2d 688, 690 (C.A. 2).

But even assuming *arguendo*, that the jury concluded that the *Illustrated Report* was not obscene material, that conclusion would not automatically cover a separate and distinct brochure advertising the *Illustrated Report*. It is the brochure that was sent out indiscriminately through the mails to unsuspecting persons, and therefore, its obscenity must be judged independently. To claim that the brochure is inseparable from the *Illustrated Report* in determining whether each is obscene is to ignore reality. Obscene advertisements could be readily prepared for works of literature which are plainly non-obscene. Conversely, it would be just as simple to prepare a non-obscene advertisement for an obscene book.

The brochure and the *Illustrated Report* are distinguishable, and different evidence was presented to show each one's obscenity. With regard to social value, the predominant part of the brochure consists of obscene pictures with little else, while the *Illustrated Report* contains the text of the Commission's report as well as a number of pictures (in addition to those in the brochure) which may not be obscene. Thus, the jury could well have found the *Illustrated Report* had some social value while the brochure did not.

Moreover, as Frank Getlein, a government witness properly qualified as an expert on patent offensiveness and social value (R.T. 2341), testified, "the illustrations in the throw away are certainly among the more extreme sexual illustrations to be found in the text" (J.A. 151). Since the obscenity of the material must

be determined on the basis of the material as a whole and not part by part, this concentration of extremely offensive material constituting the predominant part of the brochure could have influenced the jury's decision that the brochure was patently offensive, but the *Illustrated Report* was not. This same reasoning could also apply to the prurient appeal standard, since it too must be measured by examining the material as a whole.

2. The advertisements found non-obscene in *United States* v. *Pellegrino,* 467 F. 2d 41 (C.A. 9) and *United States* v. *Palladino,* 475 F. 2d 65 (C.A. 1), vacated and remanded for further consideration in light of *Miller* v. *California,* 413 U.S. 916, reversed and remanded, No. 72–1005 (C.A. 1, January 7, 1974) are readily distinguishable from the advertisement involved here. As the court noted in *Pellegrino, supra,* 467 F. 2d at 43, n. 4: "The brochure does not contain portrayals of explicit sexual activity between persons." The brochure involved here does. The *Pellegrino* brochure did not even contain the "feast-your-eyes-on" type of pornographic entertainment found obscene by the Ninth Circuit in *Miller* v. *United States,* 431 F. 2d 655.

In *United States* v. *Palladino,* No. 72–1005 (C.A. 1, January 7, 1974), slip op. at p. 4, the First Circuit held on the remand that consistency required it to find the advertisement for "Photographic Deck of Sexual Love" to be non-obscene, because the jury found the actual "Photographic Deck of Sexual Love" to be non-obscene. Initially, we note that the photographs on the playing cards depicted a man and a woman in various sex positions with no explicit sexual activity

displayed. *United States* v. *Palladino*, 475 F. 2d 65, 69 (C.A. 1). The advertisement was only a partial representation of those photographs (*id.* at 71).

Moreover, the court's holding that consistency required its finding that the advertisement was non-obscene was based on its prior finding on independent review of the material that the photographs "consist[ed] simply of sex positions." *Palladino, supra*, 475 F. 2d at 71. Such material is significantly different from the explicit sexual activity portrayed in the brochure involved here. Moreover, unlike the "Photographic Deck of Sexual Love," the *Illustrated Report* was not the basis of any counts on which the jury acquitted the defendants. *Palladino, supra*, 475 F. 2d at 69. Therefore, there is no implicit holding that the *Illustrated Report* was not obscene from which it could be argued that the jury's decision on the brochure was inconsistent.

3. Petitioners argue at length (Pet. Br. 61–66) that their expert witnesses established that the brochure did not appeal to the prurient interest, that it was not patently offensive, and that it had social value. The government's expert witnesses contradicted each pertinent opinion of petitioners' experts.[36] The jury, of course, is not bound to accept the opinion of any expert in weighing the evidence.

Moreover, in light of the Court's recent holding in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and

[36] The determination of the expert's competency and qualifications to testify is within the trial court's discretion. *Fineberg* v. *United States*, 393 F. 2d 417, 421 (C.A. 9). No abuse of that discretion has been shown here.

Kaplan v. *California*, 413 U.S. 115, 120–121, expert testimony is not necessary to enable the jury to judge the obscenity of material which has been placed in evidence. The government, however, introduced expert testimony to explain the appeal that some of the material might have to the prurient interest of sexually deviant groups, which the jury might not perceive or understand (R.T. 1694–1718). It thus avoided the possible problems this Court anticipated in *Paris Adult Theatre I, supra*, 413 U.S. at 56, n. 6.[37]

V. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS

Petitioners contend (Br. for Pet. Kemp, *et al.* 51–63) that the evidence was insufficient to support a finding that they were aware of the contents of the advertisement, that they caused it to be mailed, or that they conspired to mail it. The evidence refutes these contentions.

1. The evidence showed that petitioners Reed Enterprises, Inc. and Library Service, Inc. were responsible for mailing the advertising brochures. Reed Enterprises ultimately paid the mailing service which actually placed the brochures in envelopes and affixed the postage (J.A. 122–132, Gov. Exhs. 25, 47, 48). Library Service was identified in the brochure and on

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[37] "We reserve judgment [on the use of expert testimony], however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest."

the return envelope as the party responsible for the mailing (J.A. 92a, Gov. Exhs. 2–13). The four individual petitioners were shown by the corporate documents to have been either officers or board members, or both, of one or both of the corporate petitioners during some or all of the period of time in which the offenses were committed (Gov. Exhs. 30–37a, 84–90). As in *Mishkin* v. *New York*, 383 U.S. 502, 504–505, petitioners "[were] not prosecuted for anything [they] said or believed, but for what [they] did, for [their] dominant role in several enterprises engaged in producing" and distributing obscene materials.

2. Petitioner Hamling played an active role in causing the brochure to be mailed. As president of the corporate entities, he was in control of all their operations. More specifically he signed a Reed Enterprises' check of $4,102.27 (Gov. Exhs. 47, 48) to Regent House in payment for mailing the brochures, and a check of $4,843.14 to London Press for printing the brochures (Gov. Exh. 56). It blinks at reality to argue that petitioner Hamling served as president of the corporations and signed two checks totalling nearly $9,000 to cover costs for distributing the brochures by mail, but was nevertheless ignorant of the contents of the brochures and the fact that they were to be distributed through the mails.

3. Petitioner Kemp was the Vice President and Editorial Director of Greenleaf Classics, Inc., the publisher of the *Illustrated Report* (Gov. Exhs. 19, 21). Greenleaf Classics operated from the same business address as Reed Enterprises and Library Service (J.A. 138). Petitioner was identified at trial by a

postal employee as the individual who signed the Post Office Box rental application for P.O. Box 20308, the box number that appears on page 352 of the *Illustrated Report*, on the advertising brochure, and on the return envelope which accompanied the brochure (J.A. 137–146). The illustrations used in the advertising brochure were taken from illustrations in the *Illustrated Report*.

The nature of the relationship of Greenleaf Classics, in which petitioner served in an executive capacity, to the corporate petitioners, together with petitioner's dominant role as editor of the *Illustrated Report*, from which the illustrations used in the advertising brochure were taken, and his role in assisting with arrangements for the brochures' distribution by mail, support the inferences both that he had knowledge of the contents of the materials and that he helped cause their distribution by mail.

4. Petitioner Thomas, an officer of the corporations involved, signed all but one of the San Diego Municipal Business License Applications for the corporations (Gov. Exh. 41a–e). Additionally, he dealt with a Pitney Bowes employee, James Fernandez, regarding the rental of postage meter no. 901613, and he instructed Fernandez to install the meter at petitioner Library Service, Inc. The meter was used for the mailings of the *Illustrated Report*, the substantive offenses alleged in counts 19 and 21 (J.A. 132–134; Gov. Exhs. 19, 21). Thomas also signed Library Service, Inc., check number 340 for $12,000 for payment on account with Reed Interprises, Inc., Library Service's vendor for the *Illustrated Report* (Gov. Exh. 64).

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While these facts did not constitute direct evidence of Thomas' part in causing the mailing of the brochure, they did show that he was a pivotal corporate figure in Library Service, the party identified on the brochure as responsible for its mailing. Given petitioner Thomas' position as a responsible official of the corporation directly responsible for the mail distribution of the brochure and his involvement in that capacity with transactions related to the distribution of the *Illustrated Report,* the jury was entitled to infer Thomas' knowledge of and participation in the entire transaction related to mail solicitation, including an awareness of the brochure's contents.

5. While the evidence of petitioner Wright's involvement is somewhat more attenuated, it is still sufficient to support her conviction. The evidence was that she was an officer and/or board member of many years' standing in the corporate entities; she is secretary of Reed Enterprises (Gov. Exhs. 35, 39a). Her important role in the corporations' activities is shown by the corporate resolutions authorizing her to travel abroad in the interests of corporate affairs (Gov. Exhs. 30–37a, 84–90). The testimony of a postal employee showed that she personally and actively participated in the affairs of Reed Enterprises at the Camino del Rio South offices of the corporation, where she typed and signed post office box rental applications for the post office boxes used by the corporations in their mail-order business (J.A. 137–146).

Her knowledge of the transactions involving the *Illustrated Report* and, by inference, the brochure, is underscored by a letter from London Press, Inc.,

specifically addressed to her, as representative of Reed Enterprises, confirming shipment of 28,537 copies of the *Illustrated Report* on December 17, 1970, shortly before the brochures here in issue were mailed out (Gov. Exh. 51). Considering Wright's position in the corporate hierarchy and her management of the everyday corporate affairs, as well as her responsibility for the post office boxes rented by the corporation, she can hardly be heard to claim she was unaware of the nature of the advertising brochure mailed or that she had nothing to do with its mailing.

In sum, the evidence warranted the inference that petitioners, as responsible corporate officials in the mail solicitation scheme, were aware of the contents of the brochure. Direct proof showing an actual examination of the brochure is unnecessary. *Smith* v. *California*, 361 U.S. 147, 154. Moreover, one who deliberately "insulates himself against knowledge about * * * offending [material] is [not] thereby free to maintain an emporium for smut" (*id.* at 161; concurring opinion of Mr. Justice Frankfurter).

6. Petitioners' claim that the conspiracy was not proved is equally without merit. It is axiomatic that the existence of an agreement, the gravamen of the conspiracy offense, may be shown by circumstances indicating that petitioners acted in concert to achieve a common goal. *E.g.*, *Blumenthal* v. *United States*, 332 U.S. 539. Here petitioners, all officials of the corporate petitioners, engaged in related transactions which caused the mailing of obscene brochures in order to obtain orders for the *Illustrated Report*. These activities were unquestionably concerted and in furtherance of a common unlawful goal.

VI. THE TRIAL COURT'S OTHER PROCEDURAL RULINGS THAT PETITIONERS CHALLENGE EITHER WERE PROPER OR DID NOT PREJUDICE THEM

A. THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONERS TO OBJECT TO THE INSTRUCTIONS OUT OF THE PRESENCE OF THE JURY DID NOT PREJUDICE THEM

Petitioners contend (Pet. Br. 72–87) that the trial court's denial of their request to object to the instructions out of the presence of the jury in accordance with Rule 30 of the Federal Rules of Criminal Procedure[38] was reversible error. The test of reversible error is not whether there was simply a technical violation of a rule of procedure—as there was here—but whether the accused was prejudiced. Since petitioners were not prejudiced, their convictions should not be reversed.

Rule 30 is patterned after Rule 51 of the Federal Rules of Civil Procedure, although it provides, in addition to objections outside the hearing of the jury, for objecting out of the presence of the jury. The Ad-

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[38] Rule 30, Fed. R. Crim. P., provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury*" (emphasis added).

visory Committee on the Federal Rules of Criminal Procedure declared in the note attending Rule 30:

> This rule corresponds to rule 51 of the Federal Rules of Civil Procedure, the second sentence alone being new. It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.
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> * * * * *

The denial of a request under Rule 51 to object to instructions out of the hearing of the jury has been held grounds for reversal only if there is a reasonable basis for concluding that there was resultant prejudice. *Swain* v. *Boeing Airplane Co.*, 337 F. 2d 940, 943 (C.A. 2). In view of the almost identical wording of the two rules,[39] we urge that the similar requirements of Rule 30 also be so construed.

Any other interpretation would be inconsistent with the way in which other provisions of Rule 30 have been interpreted. That rule, for example, also requires that "the court *shall* inform counsel of its proposed

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[39] Rule 51 Fed. P. Civ. P., provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

action upon the requests prior to their arguments to the jury * * *" (emphasis added). Yet mere non-compliance with this requirement in the absence of a showing of prejudice, is not grounds for reversal. See *United States* v. *D'Argento*, 373 F. 2d 307 (C.A. 7), certiorari denied *sub nom. Schang* v. *United States*, 389 U.S. 833; *Steinberg* v. *United States*, 162 F. 2d 120 (C.A. 5).

Moreover, the other circuits which have dealt with this question have held that non-compliance with the instant provision of Rule 30 is not reversible error (1) unless the defendant demonstrates that he has been prejudiced, *Sultan* v. *United States*, 249 F. 2d 385, 388 (C.A. 5); *Hodges* v. *United States*, 243 F. 2d 281 (C.A. 5); *United States* v. *Fernandez*, 456 F. 2d 638 (C.A. 2); *United States* v. *Titus*, 221 F. 2d 571, 573-574 (C.A. 2); *United States* v. *Hall*, 200 F. 2d 957 (C.A. 2), or (2) where it appears affirmatively that the defendant was not prejudiced. *United States* v. *Schartner*, 426 F. 2d 470 (C.A. 3); *Lovely* v. *United States*, 169 F. 2d 386, 391 (C.A. 4).[*]

On this record petitioners have made no showing of prejudice, and no conclusion of prejudice can be drawn from the record. The bench conference which

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[*] To the extent that in *Hall* v. *United States*, 378 F. 2d 349, the Tenth Circuit declared that failure to comply with Rule 30 is grounds for automatic reversal, no matter how great the extenuating or mitigating circumstances or how insignificant the prejudice wrought, we believe that decision is erroneous. No other circuit has adopted so severe and uncompromising a rule. See, *e.g.*, *United States* v. *Fernandez*, 456 F. 2d 638 (C.A. 2); *United States* v. *Schartner*, 426 F. 2d 470 (C.A. 3); *Sultan* v. *United States*, 249 F. 2d 385 (C.A. 5); *Lovely* v. *United States*, 169 F. 2d 386 (C.A. 4).

followed petitioners' request to voice objections outside the presence of the jury was one of many such conferences held during the trial. Nothing occurred during that conference from which the jury might have drawn conclusions unfavorable to them.

Indeed, there is no evidence that the jury overheard any of the discussion at the bench conference. Moreover, even if the discussion had been overheard, it is doubtful that petitioners would have suffered any prejudice, since the entire colloquy concerned legal and not factual issues (J.A. 258–265). The court's refusal to excuse the jury was quite understandable in view of the length of the trial, the numerous bench conferences that had already taken place, and defense counsel's statement that he only wished the jury "excused for a few moments" (J.A. 257). In those circumstances, the court could fairly conclude that any objections to its charge could best be dealt with in a summary fashion at a bench conference.

After discussing the issue at length, the court of appeals observed (481 F. 2d at 324):

> In conformity with the settling of instruction conference phase of Rule 30 the District Court and counsel held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given by the District Court and noting counsel's objections thereto.[11]

Indeed, the trial court intended the bench conference only "to be a perfunctory record saving session" (481

[11] As the colloquy at this conference quoted at length in the opinion below (481 F. 2d 324–325) shows, the trial court intended to "incorporate all objections made at this time as though the conference had been held after the instructions were given."

F. 2d at 324). Since there is no showing that the denial of the request prejudiced petitioners, any error committed in denying petitioners' Rule 30 request was harmless. Rule 52(a), Fed. R. Crim. P.

B. THE TRIAL COURT PROPERLY DENIED PETITIONERS' MOTION FOR CONTINUANCE TO ALLOW TIME TO SUPPLEMENT THE JURY WHEEL

Petitioners contend (Pet. Br. 87–94) that the jury was improperly constituted because an allegedly cognizable class of citizens, "young adults," which they define as those between the ages of 18 and 24, were systematically excluded,[42] and that in such circumstances it was an abuse of discretion for the trial court to refuse to grant a continuance until a new jury, presumably containing a larger portion of "young people," was drawn.

1. The jury selection plan of the Southern District of California, consistent with 28 U.S.C. 1863(b)(2) and 1863(b)(4), provides for periodic emptying and refilling of the master jury wheel from voter registration lists, "the interval for which shall not exceed four years."[43] This procedure accomplishes the important objective of securing a fair cross-section of the

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[42] In fact, as the court of appeals noted: "there were a few persons on the venire of that age [24 years old]" (481 F. 2d at 313).

[43] At the time of petitioners' indictment and trial, the Plan provided for emptying and refilling of the master jury wheel every four years and it was slightly less than four years since it had last been filled. Congress has subsequently amended 28 U.S.C. 1863(b)(4) to provide that the master jury wheel must be emptied and refilled by September 1, 1973, and no less often than every four years thereafter. Pub. L. No. 92-269, 86 Stat. 117 (April 6, 1972).

community in the jury wheel while at the same time accommodating the practical problems of judicial administration.

Because the wheel is emptied and filled periodically, persons added to the voter registration lists after refilling cannot be placed in the master wheel until it is again refilled. Since each time the jury wheel is refilled, new young voters are added, the periodic delays occasioned by problems of administration do not amount to discriminatory exclusion.[*] There was, in short, no evidence of "purposeful discrimination" in this case. *Whitus* v. *Georgia,* 385 U.S. 545, 551.

Moreover, there is no requirement that a jury be a statistical mirror of the community, *United States* v. *DiTommaso,* 405 F. 2d 385, 389 (C.A. 4), or conform to the proportionate strength of each identifiable group in the total population, *Simmons* v. *United States,* 406 F. 2d 456, 461 (C.A. 5); it is only required that there be no discriminatory exclusion. See *Alexander* v. *Louisiana,* 405 U.S. 625. The under-representation of the young in the jury pool has been repeatedly sustained in view of their mobility and commitments to education and military service. See *United States* v. *Gast,* 457 F .2d 141 (C.A. 7); *United States* v. *Camara,* 451 F. 2d 1122 (C.A. 1); *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1). This is, of course, particularly true of young people, ages 18 to 24, who comprise the over-

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[*] The courts have upheld jury plans that have not been updated for three years, *United States* v. *Pentado,* 463 F. 2d 355 (C.A. 5); three years, four months, *United States* v. *Gooding,* 473 F. 2d 425 (C.A. 5), and five years, *United States* v. *Kuhn,* 441 F. 2d 179 (C.A. 5).

whelming majority of college and draft-age persons.

2. Petitioners have also failed to establish that "young adults" are a distinct group. *Cf., Hernandez* v. *Texas,* 347 U.S. 475. The "young" share no common characteristic except chronological age.[45] *United States* v. *Gargan,* 314 F. Supp. 414 (W.D. Wis.). In *United States* v. *Butera, supra,* where young adults were held to comprise a distinct group, the court defined "young" as including persons, between 21 and 35, not 18 to 24.[46] Moreover, there is nothing identifiable or distinctive about young persons, between 18 and 25, to set them apart from young persons, over 25, who were eligible for jury duty here. See *United States* v. *Gooding,* 473 F. 2d 425, 430 (C.A. 5), citing *United States* v. *Kuhn,* 441 F. 2d 179, 181 (C.A. 5).

3. Since petitioners failed to support their claim that the jury was improperly constituted, the trial court acted within its discretion in denying petitioners' motion for a continuance. See *United States* v. *Spoonhunter,* 476 F. 2d 1050 (C.A. 10); *United States* v. *Rosenthal,* 470 F. 2d 837 (C.A. 2).

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[45] Petitioners themselves contend that the most important factor in determining a person's views on pornography is not age but religious upbringing (Pet. Br. 94).

[46] In *United States* v. *Kuhn,* 441 F. 2d 179 (C.A. 5), the Fifth Circuit rejected the notion that persons between 21 and 23, constituted a distinct group for jury selection purposes.

C. THE TRIAL COURT PROPERLY CONDUCTED THE JURY *VOIR-DIRE* ON QUESTIONS CONCERNING SEX AND OBSCENITY

The manner in which voir dire of the jury is conducted is within the discretion of the trial court, whose rulings will not be disturbed on appeal unless the court clearly abused its discretion. *United States* v. *Linn*, 438 F. 2d 456 (C.A. 10); *Haslam* v. *United States*, 431 F. 2d 362 (C.A. 9), certiorari denied, 402 U.S. 976; *Tillman* v. *United States*, 406 F. 2d 930 (C.A. 5). No abuse of discretion took place here.

As Rule 24(a) of the Federal Rules of Criminal Procedure permits, the trial court itself conducted the *voir dire* examination using additional questions submitted by counsel. The court of appeals held that the *voir dire* examination was "full, complete and imminently [*sic*] fair" to petitioners (481 F. 2d at 314). Of the 130 separate questions submitted by petitioners, many of which were composed of multiple sub-questions, the district court asked "many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative" (481 F. 2d at 314).[47]

The court's refusal to ask cumulative, argumentative or tangential questions was proper and certainly did

[47] The court did ask questions of prospective jurors intended to expose any prejudices involving "obscenity" or related matters (R.T. 248–250, 253–257, 261–262).

not constitute an abuse of discretion. *United States* v. *DePugh*, 452 F. 2d 915 (C.A. 10), certiorari denied, 407 U.S. 920. Moreover, since the voir dire examination was sufficient to test the qualifications and competency of the prospective jurors, the restrictions placed by the court on the examination were not an abuse of discretion simply because the examination might possibly have been more searching; that is always a possibility, *Kreuter* v. *United States*, 376 F. 2d 654 (C.A. 10), certiorari denied, 390 U.S. 1015.

Petitioners' reliance on *Aldridge* v. *United States*, 283 U.S. 308 and *Ham* v. *South Carolina*, 409 U.S. 524 is misplaced. These cases established the right to explore on voir dire examination the racial biases of prospective white jurors when a black defendant is involved. In the instant case, however, the purpose of petitioners' proposed questions was not to uncover racial bias or even religious prejudice, but to probe the religious upbringing of the jurors and its resultant effect on their views on obscenity.

Though "pornography" is a controversial issue, that alone does not justify the sweeping inquiry petitioners wanted. See *Ham* v. *South Carolina*, *supra*; *United States* v. *Owens*, 415 F. 2d 1308 (C.A. 6), certiorari denied, 397 U.S. 997; *United States* v. *Clancy*, 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312. *Ham* v. *South Carolina*, *supra*, is instructive. Though this Court in *Ham* held that the trial court's refusal to inquire into the racial bias of prospective white jurors against a black defendant was reversible error, it rejected a similar contention concerning the

trial court's failure to inquire into a potential bias against beards. It did so because the trial court had asked a general question about bias and this Court was unable "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudicies * * *" (409 U.S. at 528). Here the trial court did ask questions about attitudes toward obscenity, but properly found the questions about religion (Pet. Br. 94) too tangential to the issues on trial.

At all events, as the court below concluded in the particular circumstances, the voir dire was completely fair and the assignment of error "is without merit" (481 F. 2d at 314).

VII. THE GRAND JURY WAS NOT PREJUDICED AGAINST PETITIONERS

Petitioners contend (Pet. Br. 99–101) that the action of government counsel before the Grand Jury prejudiced that body. As the court of appeals below held in rejecting that contention (481 F. 2d at 313):

> The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the appellants, except only a supposition as to how the members have reacted upon a view of the Brochure and Report.

Contrary to petitioners' assertion, this language does not constitute an acknowledgment by the court below, by supposition or otherwise, that "the Grand Jury may have been 'biased or prejudiced' against petitioners 'upon reviewing the Brochure and Re-

port'" (Pet. Br. 99). The court's statement was obviously intended as a complete rejection of petitioners' challenge to the Grand Jury proceedings.[48]

Petitioners have failed to adduce any evidence of prejudice. Their unsupported allegations do not overcome the presumption of regularity which attends Grand Jury proceedings. *Vuckson* v. *United States*, 354 F. 2d 918, 921 (C.A. 9), certiorari denied, 384 U.S. 991; *Blumenfield* v. *United States*, 284 F. 2d 46 (C.A. 8), certiorari denied, 365 U.S. 812; *United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2), certiorari denied, 353 U.S. 912.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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[48] Petitioners' reliance on *United States* v. *Whitted*, 325 F. Supp. 520 (D. Neb.) and *United States* v. *DiGrazia*, 213 F. Supp. 232 (E.D. Ill.), is misplaced. The decisions in those cases rested on the impossibility of determining whether evidence or prejudice prompted the Grand Jury's actions. The language of the court of appeals quoted above leaves no room for doubt that the instant indictment rested on evidence alone.

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